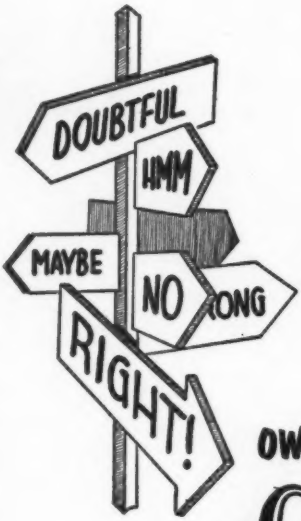
LOS ANGELES BAR BULLETIN

In This Issue

Vol. 29 APRIL, 1954 No. 7



Be Sure
OF YOUR APPROACH!

own and use
CAL. JUR. 2d

CALIFORNIA JURISPRUDENCE 2d gives you a precise statement of ALL California law. WHY NOT BE *SURE* OF YOUR APPROACH ON EVERY PROBLEM?

When you want a quick answer to WHAT the law is . . . or how to enforce a right . . . when you want the reason of the law as well as the application thereof to factual situations . . . when you want more accurate briefs . . . TURN FIRST TO CALIFORNIA JURISPRUDENCE 2d.

CAL JUR 2d eliminates the chief worry of your practice . . . UNCERTAINTY. Be safe in the conclusions you reach by owning CAL JUR and using it on every question.

Write today for special prepublication terms.

BANCROFT-WHITNEY CO.

Lawbook Publishers Since 1856

McALLISTER & HYDE STREETS
SAN FRANCISCO 1, CALIFORNIA

230 WEST FIRST STREET
LOS ANGELES 12, CALIFORNIA

Los Angeles
BAR BULLETIN

Official Monthly Publication of The Los Angeles Bar Association, 241 East Fourth Street, Los Angeles 13, California. Entered as second class matter October 15, 1943, at the Postoffice at Los Angeles, California, under Act of March 3, 1879. Subscription Price $1.80 a Year; 15c a Copy.

VOL. 29 APRIL, 1954 No. 7

PUBLIC RELATIONS

Harold A. Black

You are probably familiar in a general way with "Law in Action," the series of short articles explaining the law and the work of the lawyer in very simple terms, which have appeared in nearly seventy community newspapers in Los Angeles County. This project is part of the State Bar's public relations program. The articles are prepared by a committee of lawyers and are released through the State Bar office. *The Los Angeles Daily Journal*, under the leadership of Telford Work, was instrumental in getting the articles published quite generally throughout Los Angeles County.

The first 26 releases have been compiled into booklet form for distribution to schools and libraries for use in classes in civics, elementary law and government. The articles are extremely well done: clear, concise and informative. The subjects in the first series cover a wide range from automobile accidents and contracts to wills and jury duty. Another booklet is contemplated after publication of the second series of 26 articles. The *Daily Journal* merits the thanks of every member of the Bar for this excellent co-operation.

All of this prompts me to observe with satisfaction that the bar throughout the nation is increasingly aware of the desirability of paying more attention to public relations. Much is being done in the direction of spreading accurate information about the law and the legal profession. Our own Association is doing effective work

through its public relations advisor, John Rose, and its Committee headed this year by Stanley Anderson. Traditionally the lawyer has not come off very well in surveys testing what the public thinks about him. The rather low score in the popularity contest is doubtless due in part to ignorance or misinformation which well written articles and radio and television material can help to dispel.

But we must realize that we will have good public relations only to the extent we collectively and individually earn them.

As a profession we must heed and do something about just complaints of the public about the expense and delay of litigation. We must assume the responsibility of providing legal advice to those who cannot afford to pay much, or anything. As a profession we must be eternally vigilant in eliminating the dishonest and the unethical from our ranks. We must (although here the legislature is a perennial problem) admit to practice only those whose education and training promise reasonable ability in the handling of a lawyer's work.

As individuals we must bear in mind that our own conduct is the most important factor in bringing about sound public relations. Unless each of us accepts the propostion that his own level of professional competence, his own industry, his own ethical standards, his own candor and integrity have a bearing on what people think of lawyers, no public relations program, however well planned or financed, can accomplish very much. A single dissatisfied and highly vocal client can undo a lot of hard work by a public relations committee. Conversely, every time a job is done in such a manner as to cause the client to feel that he has received good service, promptly performed, for a fair fee, the lawyer has strengthened not only his own reputation, but that of the profession generally.

The Copying of Another's Product as Unfair Competition

By Louis Licht*

Louis Licht

The law of unfair competition has evolved as the answer to the exigencies of a complex economic order which cannot properly function under the law of the jungle. The field of unfair competition is very broad, covering such matters as trade names, trade secrets, trade marks, disparagement of a rival's goods, price maintenance and many others. But I shall be concerned here with only one phase of the subject: the simulation of another's product.

It may be stated as a general rule that in the absence of a patent, a person may copy and sell an article manufactured by another. Functional features, that is, features which are necessary to the usefulness of the article may be copied; for otherwise every manufacturer who made an advance or improvement in his product would, in effect, have a monopoly, although he could not obtain a patent for his improvement.

However, where a functional feature or features have acquired a secondary meaning, the person copying must adequately distinguish his product to avoid confusion with the original.

Secondary meaning is said to exist where a feature or features of an article or the article itself have become associated in the public mind with a certain source.

> "The existence of secondary meaning or an identification coming from appearance is sufficient if it brings deceit as to identity of the article sold under plaintiff's trade mark or trade name." *Upjohn* v. *William S. Menell Chemical Co.,* 269 Fed. 209, 213 (CCA 6, 1920).

In the case of *Fox* v. *Best Baking Co.,* 95 N.E. 747 (Mass., 1911), the defendant company baked and sold bread resembling the oval shape and appearance of plaintiff's bread. At page 749 the Court said:

> "And the defendants would have a right to make and sell bread which has that shape were it not for the fact that bread

*Member of the Los Angeles Bar Association.

of that shape means to the public that it is made by the plaintiff. From this it follows that the defendants can use that shape of loaf if they take such precautions as will prevent their bread from being taken for the plaintiff's bread."

The defendant has a perfect right to imitate and copy plaintiff's product and get the benefit of the consumer demand created by the first comer in the field, but he may not get the benefit of the public's desire to purchase goods made by the plaintiff. In short, the defendant must take care not to deceive the public into believing that defendant's product is plaintiff's product.

Non-functional features of an article by which purchasers recognize and identify the article as being that of the plaintiff may not be copied. Here again the secondary meaning acquired by such non-functional features constitutes the basis for the legal protection afforded the first user. If the second user imitates those features of the article, the public may be led to believe that it is purchasing the product of A when in fact it is purchasing the product of B.

In *Florence Mfg. Co.* v. *Dowd & Co.*, 178 Fed. 73 (CCA 2, 1910), the Court said,

"It is so easy for the honest business man, who wishes to sell his goods upon their merits, to select from the entire material universe, which is before him, symbols, marks and coverings which by no possibility can cause confusion between his goods and those of competitors, that the courts look with suspicion upon one who, in dressing his goods for the market, approaches so near to his successful rival that the public may fail to distinguish between them. The law is not made for the protection of experts, but for the public — that vast multitude which includes the ignorant, the unthinking and the credulous, who in making purchases, do not stop to analyze, but are governed by appearances and general impressions."

Since the Courts will only enjoin the imitation of non-functional features and require the imitator of functional features to carefully distinguish his product from that of the first user, it is important to determine the legal definition of a non-functional feature as distinguished from a functional feature.

Functional features include not only those which lend utility and efficiency to the article, but also those which contribute to its appearance or may affect the cost of production. *Kellogg* v. *National Biscuit Co.*, 305 U. S. 111, 122 (1938).

In the recent case of *Pagliero* v. *Wallace China Co., Ltd.*, 198 F. 2d 339 (CCA, 1952), the Ninth Circuit Court held that the design

(Continued on Page 209)

"Too Little Consent for So Great a Settlement"—Or Is It?

By Ira M. Price II*

Ira M. Price II

The client who wonders if he can safely cash a check marked "payment in full," when he claims a larger sum due him, was recently given some free advice in two issues of this *Bulletin*.[1] It was suggested in one of the articles[2] that even though the claim is liquidated or undisputed, endorsing and cashing of the check bars recovery of the balance because of Civil Code Section 1524. If the client has not yet cashed his check and wants more advice, he may be interested in the following comment on that statute.

First enacted in 1872, Section 1524 provides: "Part performance of an obligation, either before or after a breach thereof, where expressly accepted by the creditor in writing, in satisfaction . . . though without any new consideration, extinguishes the obligation." The statute was probably intended to relax the common law principle that prevented a creditor, for "lack of consideration," from effectively agreeing to settle up a liquidated debt for less than the full amount due him.[3] To date, however, Section 1524 has been largely ignored and its influence upon our law of accord and satisfaction has been negligible.[4]

In "check" cases, Section 1524 has been applied hardly at all. There is some question whether endorsing and cashing a check, alone, will satisfy the statute's requirement of an "express," written acceptance of partial performance. It was apparently taken for granted in a leading case,[5] that for Section 1524 to apply to a creditor who cashed a check tendered in full payment, a separate written agreement must be executed by the parties. Except possibly

*Member of the Los Angeles Bar Association.

[1]"Payment in Full"—Or Is It?, 29 L. A. Bar Bulletin (Jan. 1954) 99; "Too Little Payment For So Great a Debt"—Or Is It?, 29 L. A. Bar Bulletin (Feb. 1954) 135.
[2]"Too Little Payment For So Great a Debt"—Or Is It?, *supra*, Note 1.
[3]*B. & W. Engineering Co. v. Beam*, 23 C. A. 164 (1913).
[4]See Annotations to Deering's Civil Code of California, Section 1524.
[5]*B. & W. Engineering Co. v. Beam*, *supra*, Note 3; where the court held Section 1524 to be inapplicable, but found that an accord and satisfaction had been effected within the rule that, "before a dispute concerning a claim for money can be made the basis of an agreement of accord and satisfaction, it must be shown that such dispute was bona fide." See also *Russell v. Riley & Peterson*, 82 C.A. 729 (1927).

for *Schwartz v. California Claims Service*,[6] no reported California decision has been found in which Section 1524 has been used to deny a claimed balance to a creditor who merely endorsed and cashed a check tendered in full settlement of a liquidated or undisputed debt.

Schwartz, however, differs from the usual "check" case in that there the parties evidentally made a full settlement agreement, for the creditor (1) through an attorney, signed and delivered to the debtor a satisfaction of judgment, and (2) endorsed and cashed the check apparently without protest. The decision, then, may be uncertain authority for holding that Section 1524 is to be applied generally to the ordinary "check" situation, especially since the same District Court in a later "check" case applied the usual rule that an accord and satisfaction must be founded upon a good faith dispute.[7]

Our California Supreme Court to date has failed to interpret Section 1524 as barring a creditor from recovering the balance of a liquidated or undisputed debt merely because he signed and cashed under protest a check tendered in full payment. To the contrary, in decision after decision by that court as well as the District Courts of Appeal the rule is stated to be that the claimed accord and satisfaction must be founded upon a "bona fide" or "good faith" dispute between the parties.[8]

In short, our courts appear unwilling to hold that a creditor who signs and cashes such a check under protest has thereby made an express, written agreement of satisfaction within the meaning of Section 1524. The creditor may make a settlement by endorsing the check, but this result to date has depended not upon Section 1524 but upon application of the usual rules of accord and satisfaction.[9]

---

[6]52 C.A. (2d) 47 (1942), cited in "Too Little Payment For So Great a Debt"—Or Is It?, *supra*, Note 2.

[7]*Pyle v. Exeter Refining Co.*, 60 C.A. (2d) 236 (1943). See also *Weinberg v. Belond*, 81 C. A. (2d) 201 (1947), where the same District Court of Appeal found no accord and satisfaction, although the creditor endorsed and cashed checks marked "commissions in full to date," because he continued to insist upon further payment and there was evidence that the debtor led him to believe he would be paid.

[8]See decisions cited in "Payment in Full"—Or Is It?, including *Berger v. Lane*, 190 Cal. 443 (1923); *Potter v. Pacific Coast Lumber Co.*, 37 Cal. (2d) 592 (1951); and *Kelly v. David D. Bohannon Organization*, 119 C. A. (2d) 787 (1953) where the court, after quoting Section 1524, found no settlement in the cashing of checks marked "payment in full," because "there was no bona fide dispute to serve as a basis for an accord and satisfaction."

[9]For which rules, see "Payment in Full"—Or Is It?, *supra*, Note 1. *Cf. Ingram & Co. v. N. Blackstone, Inc.*, L. A. Super. Ct., App. Dept. No. C.A. 404 (1931), an old unreported memorandum decision apparently not since cited by any court, where it was held that Section 1524 applied to this situation, but suggested the creditor could avoid a settlement by striking out the words on the check importing full payment.

Charitable Bequests Judicially Sheltered

By William J. Hyland III*

Judicial arrogation over the proper prerogatives of the Legislature is a rare but still occasional occurrence. A fairly recent and severe instance is presented by the two decisions of the California District Court of Appeal construing Section 41 of the California Probate Code, *Estate of Davis*[1] and *Estate of Haines*.[2]

Section 41 of the Probate Code as it exists today is familiar to every practicing attorney as the section which apparently affords some protection to the relatives of a testator who has been somehow influenced to leave too much of his estate to charitable uses.[3] The legislative purpose in enacting the statute was remedial: to prevent that which was deemed a wrong and injustice to those who should naturally be the recipients of the bounty of the deceased testator[4] — "his spouse, brother, sister, nephew, niece, descendant or ancestor surviving him".[5] As a legislative act, this statute carried with it all the safeguards inherent in legislative procedure, perhaps chief among which is the representation and advocacy of all interested parties before the law making body, *including the State* which has the inherent power to determine the manner of testamentary

---

*Member of the Los Angeles Bar Association.

[1]74 Cal. App. 2d 357, 168 P. 2d 789 (1946) (Sup. Ct. hearing den. June 27, 1946. This is of doubtful effect—See e.g., *Atlantic Coast Line R. Co. v. Powe* 283 U.S. 401, 51 S. Ct. 498.)

[2]76 Cal. App. 2d 673, 173 Pac. 693 (1946).

[3]Sec. 41. Restriction. [Time of executing will: Amount of gifts: Passage of property given contrary to law.] No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, by a testator who leaves a spouse, brother, sister, nephew, niece, descendant or ancestor surviving him, who, under the will, or the laws of succession, would otherwise have taken the property so bequeathed or devised, unless the will was duly executed at least 30 days before the death of the testator. If so executed at least 30 days before death, such devises and legacies shall be valid, but they may not collectively exceed one-third of the testator's estate as against his spouse, brother, sister, nephew, niece, descendant or ancestor, who would otherwise, as aforesaid, have taken the excess over one-third, and if they do, a pro rata deduction from such devises and legacies shall be made so as to reduce the aggregate thereof to one-third of the estate. All property bequeathed or devised contrary to the provisions of this section shall go to the spouse, brother, sister, nephew, niece, descendant or ancestor of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies; otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected.

"[Section not deemed to vest property in relative.] Nothing herein contained is intended to, or shall be deemed or construed to vest any property devised or bequeathed to charity or in trust for a charitable use, in any person who is not a relative of the testator belonging to one of the classes mentioned herein, or in any such relative, unless and then only to the extent that such relative takes the same under a substitutional or residuary bequest or devise in the will or under the laws of succession because of the absence of other effective disposition in the will."

[4]*Estate of Dwyer* 159 Cal. 680, 115 Pac. 242 (1911).

[5]See Probate Code, Sec. 41.

transfer of a domiciliary's property and the power to determine who may be made the beneficiaries of that property.[6]

The two decisions referred to above, *Estate of Davis* and *Estate of Haines*, have substantially similar facts except for the time interval between the execution of the particular will and the death of the testator. In *Estate of Davis*, the testator left the residue of his estate to certain named charities and provided for a gift over to other charities in the event one of them could not take, and a gift over to non-charitable, non-relative takers in the event all charitable gifts in the residue failed. Testator left a sister, nephews and nieces surviving, died later than thirty days after executing his will, and the value of his estate left by the residuary clause of his will was greater than one-third the total value of his estate. The appeal was from an order of the Los Angeles Superior Court decreeing that all residuary gifts were valid. The two appellants were the only tax exempt residuary legatees and were thus capable of taking under Section 41 of the Probate Code.[7] Their argument on appeal was that all the residue should go to them because the other charitable legatees could not take under Section 41.

In sustaining the order appealed from, the Court said:

> "This proposition is untenable. The Legislature in 1943 added to Section 41 of the Probate Code this provision:
>
> 'Nothing herein contained is intended to, or shall be deemed or construed to vest any property devised or bequeathed to charity or in trust for a charitable use, in any person who is not a relative of the testator belonging to one of the classes mentioned herein, or in any such relative, *unless and then only to the extent that such relative takes the same under a substantial or residuary bequest or devise in the will or under the laws of succession because of the absence of other effective disposition in the will.*' (Italics supplied).
>
> "It is the italicized language of the amendment that is particularly pertinent to the case at bar. By said language the Legislature has declared that where . . . charitable gifts in a

[6] *United States v. Burnison* 339 U.S. 87, 70 S. Ct. 503 (1950) (dealing with a construction of the pre-1951 Sec. 27 of Calif. Probate Code.)

[7] "Sec. 42. Exemption of certain bequests and devises. Bequests and devises to or for the use or benefit of the State, or any municipality, county or political subdivision within the State, or any institution belonging to the State, or belonging to any municipality, county or political subdivision within the State, or to any educational institution which is exempt from taxation under section 1a of Article XIII or section 10 of Article IX of the Constitution of this State and statutes enacted thereunder, or for the use or benefit of any such educational institution, or made by a testator leaving no spouse, brother, sister, nephew, niece, descendant or ancestor surviving by whom the property so bequeathed or devised would have been taken if said property had not been so bequeathed or devised, are excepted from the restrictions of this article."

(Continued on Page 215)

Opinion of Committee on Legal Ethics Los Angeles Bar Association

OPINION No. 212
(October 22, 1953)

SUITS FOR FEES—WITHDRAWAL FROM EMPLOYMENT AS ATTORNEY
A LAWYER SHOULD WITHDRAW FROM EMPLOYMENT BEFORE SUING HIS CLIENT FOR FEES

An attorney represents a client as administrator of an estate and "in two or possibly three matters which are more or less dormant at the present time". The client has ignored requests for payment of fees and expenses and has failed to respond to the lawyer's efforts toward closing the estate and rendering an accounting. The question which the lawyer presents is whether he should withdraw as attorney before suing for fees and whether any duty to the beneficiaries of the estate prevents withdrawal.

It is the opinion of the Committee that, since a lawyer is required to represent his client "with undivided fidelity" (A.B.A. Canon 6), he should withdraw from all matters in which he is attorney for the client before commencing proceedings to secure payment of his fee.

A.B.A. Canon 44 provides that if the client "deliberately disregards an agreement or obligation as to fees or expenses, the lawyer may be warranted in withdrawing on due notice to the client, allowing him time to employ another lawyer." Accordingly, if the contractual obligation to pay has been deliberately disregarded, withdrawal is justified. No facts are stated indicating that there is any duty to the beneficiaries of the estate which prevents such withdrawal.

Suits against clients are governed by A.B.A. Canon 14:

> "Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud."

This opinion, like all opinions of the Committee, is advisory only. (By-Laws, Article X, Section 3).

OPINION No. 213
(October 22, 1953)

DUTY NOT TO DEAL WITH ONE REPRESENTED BY COUNSEL—A LAWYER SHOULD NOT, EITHER DIRECTLY OR THROUGH HIS CLIENT, INTERVIEW THE CLIENT OF ANOTHER ATTORNEY UPON A SUBJECT WHICH MIGHT AFFECT THE RIGHTS OR LIABILITIES OF THE OTHER'S CLIENT

A suit is contemplated in which one realtor as plaintiff will contend that he was deprived of a real estate commission. The defendants will be another realtor and the attorney for the buyer in the real estate transaction. No claim is contemplated against the buyer. Inquiry is made as to whether it is ethically proper for the attorney for the prospective plaintiff to send his client to the buyer to obtain a written statement.

The question involves the application of Rule 12 of the State Bar Rules of Professional Conduct and American Bar Association Canon 9. Under Rule 12 and Canon 9 a lawyer must not communicate with a party represented by counsel upon a subject of controversy (*Carpenter v. The State Bar,* 210 Cal. 520). The lawyer furthermore should not advise or permit his client to do what the lawyer is prohibited from doing (*Drinker*, p. 202; A.B.A. Op. 75; A.B.A. Canon 16).

At the same time, there is no prohibition against interviewing those who are only witnesses for the opposing party (*Drinker,* p. 201). In the present inquiry the person to be interviewed is not a party to the contemplated lawsuit.

The difficulty, however, arises from the fact that the proposed lawsuit involves matters pertaining to a business transaction in which the party to be interviewed was and apparently still is represented by counsel. The inquiry presented to this Committee does not eliminate the possibility that the interview may involve matters affecting the rights or liabilities of the buyer. So long as such a possibility exists and so long as the buyer continues to be represented by counsel, the buyer should not, at the instance of the attorney for the prospective plaintiff, be interviewed without first communicating with the buyer's attorney.

This opinion, like all opinions of the Committee, is advisory only. (By-Laws, Article X, Section 3).

Silver Memories

Compiled from the World Almanac and the L. A. Daily Journal of February, March and April, 1929, by A. Stevens Halsted, Jr.

A. Stevens Halsted, Jr.

Marking another milestone in the history of the Los Angeles Bar Association, new offices are being opened in the Rowan Building after 17 years in the I. W. Hellman Building where the offices became inadequate for a membership of over 2500. Acting Secretary **J. L. Elkins** continues in charge, with **Jean Mallory** and **Mabel Dressler** as his assistants.

* * *

After 15 years in the law department of the railroad, **Fred E. Pettit, Jr.** has resigned as general attorney for California for the Los Angeles & Salt Lake Railroad Company, one of the divisions of the Union Pacific System, to become a member of the firm of **Bauer, Wright & Macdonald.**

* * *

Curtis Dwight Wilbur, Secretary of the Navy and former Chief Justice of the California Supreme Court, has been appointed United States Judge for the Ninth Circuit. His retirement as Secretary of the Navy will make possible the appointment of his brother, Dr. **Ray Lyman Wilbur,** President of Stanford University, to the post of Secretary of the Interior.

* * *

F. G. Athearn, San Francisco attorney, has been appointed Corporation Commissioner by Governor **Young** to succeed **J. M. Friedlander.** One of his first acts in reorganizing the State Corporation Department is the transfer of Capt. **A. H. Garland,** deputy commissioner, from San Francisco to Los Angeles; and of **H. A. I. Wolch,** present assistant commissioner at Los Angeles to San Francisco. **Athearn** has announced that rules of procedure and of internal operations will be promulgated to

guide attorneys and others appearing before the department to transact business.

* * *

In New York City, **Texas Guinan,** night club hostess at the Salon Royale, and **Helen Morgan,** actress and night club entertainer, were acquitted in their respective trials for violation of the national prohibition act.

* * *

Vice-President **Curtis** declined to accept a ruling of precedence made by **Frank B. Kellogg** just before he retired as Secretary of State that Mrs. **Dolly Curtis Gawn,** the Vice-President's hostess, sister and wife of a Washington lawyer, must be seated after the wives of foreign Ambassadors and Ministers at official functions. The Diplomatic Corps then met and agreed that Mrs. **Gawn** should have the rank of the Vice-President's wife and take precedence over the wives of foreign diplomatic representatives.

* * *

Culminating three weeks of impeachment proceedings before the State Senate, Superior Judge **Carlos S. Hardy** has been acquitted by a majority vote on 5 charges of misuse of his office, on charges arising out of the **Aimee Semple McPherson** affair. The prosecution required a two-thirds vote of the elected Senators to convict. There was an outburst of applause from the Senate chamber galleries when the official role call was read off — when Lieutenant Governor **H. L. Carnahan,** who presided like a Solomon at the impeachment trial, uttered the words — ". . . and he is therefore acquitted".

* * *

New York Police Commissioner **Whalen** blames prohibition for the increase of crime in his city, declaring there are 32,000 speakeasies in New York.

* * *

The U. S. Shipping Board has turned over to the U. S. Lines, a private steamship firm, the ocean liner "Leviathan". On her first trip to Europe the ship carried liquor to be sold to passengers on the return (west) trip only.

* * *

Results of the January examinations for admission to the bar show that of 255 applicants, 52.3% failed. Among the successful new members of the bar are: **Elmer D. Doyle,**

Spring Series For Continuing Education of the Bar

Los Angeles attorneys will again have the opportunity during April and May to attend the State Bar's legal education program on "Organizing and Advising Small Business Enterprises," according to Brenton L. Metzler, Chairman of the Los Angeles Bar Association's Committee on Continuing Education of the Bar.

The 1954 spring series will consist of five lectures, covering What the Lawyer Should Know About Business, Financing of Small Business Enterprises, Organization of General and Limited Partnerships, and Organization of Corporations, with emphasis on the Close Corporation and Issuance of Securities Under the California Corporate Securities Law.

The lectures will be held in the Assembly Hall of the Embassy Auditorium, 839 South Grand Avenue. The first lecture will be given on Thursday, April 22, 1954, at 7:30 P.M.

Attorneys registering for the course will receive a copy of the newest volume of the California Practice Series handbooks titled "Organizing and Advising Small Business Enterprises."

The course is the latest of the regular series given twice yearly by the Los Angeles Bar Association and the State Bar through the facilities of University of California Extension.

Local members of the State Bar Committee on Continuing Education of the Bar are E. Rufus Bailey and Gordon F. Hampton.

SILVER MEMORIES CONT'D

John W. Holmes, Edward C. Renwick, William Bruce Renwick, Graham L. Sterling, Jr., George W. Tackabury, Jr. and **Bert G. Wetherby.**

* * *

A vast crowd in Manilla bade good-bye to Governor-General **Henry L. Stimson** when he left for Washington to take his place as Secretary of State in the new Hoover Cabinet. He left behind his pet parrot "The Old Soak."

New officers for the "Junior Committee" of the Los Angeles Bar Association for the coming year are **Edward S. Shattuck,** Chairman; **Leo Falder,** First Vice-Chairman; **Joseph Ball,** Second Vice-Chairman; and Ward Sullivan, Secretary.

* * *

City Prosecutor **Lloyd Nix** has received a ruling from the City Attorney that **C. P. Coultas** is not eligible to hold the position of Chief Deputy because he has not been admitted to the practice of law for a minimum of two years, as required by the City Charter. Following the ruling, **Coultas** has been assigned to work as a trial deputy and will assist Deputy City Prosecutor **Bernard** in trying jury cases of liquor law violation in Municipal Judge **Ambrose's** court. **Nix** has also announced the appointment of **Ray Brockman,** attorney and war veteran, as deputy prosecutor.

* * *

Judge **Raymond I. Turney** has been elected Presiding Judge of the Los Angeles Municipal Court to succeed Judge **Joseph E. Chambers.**

Issue Editor—Frederick G. Dutton

Brothers-In-Law

By George Harnagel, Jr.

George Harnagel, Jr.

According to *The Shingle* of the **Philadelphia** Bar Association, a lawyer in that city recently wrote to the coroner in a small New Jersey town to obtain a certificate evidencing the cause of a decedent's death. . . . He got a prompt response containing this laconic information: "Primary Cause of Death: Hatchet.—Secondary Cause of Death: Wife." . . . It also relates that another one of its practitioners is going about with a red face. . . . He dictated a communication to a client reading, "Please be good enough to sign the enclosed papers." . . . His secretary, however, made a mistake in one itsy, bitsy letter . . . and it went out: "Please be goof enough to sign the enclosed papers."

* * *

The Minimum Fees Committee of the **Oregon** State Bar is undertaking an economic survey of the legal profession in that state.

* * *

Nevada has adopted rules of practice modeled after the federal rules of civil procedure.

* * *

The **Seattle** Real Estate Board makes an annual selection of "Seattle's First Citizen." Its last award went to Frank E. Holman, of the Seattle bar, past president of the American Bar Association.

* * *

The **Chicago** Bar Association has announced that its twelfth annual photographic contest and exhibition will occur next June. The schedule of awards include a grand prize, to be determined by popular vote of members of the Association, and additional prizes in the following categories: portraits, general and color.

* * *

"I think it may fairly be said . . . that lawyers as a class

work very hard, and much harder than many other elements in the community. But it is no hardship. They love their work. I do not feel sorry for them." — From a recent address by Erwin N. Griswold, Dean of Harvard Law School to the **Cleveland** Bar Association.

* * *

The Hon. Malcolm Douglas of the Superior Court of King County, **Washington,** the Senior judge of that court and of the entire state, was recently honored on the occasion of his 65th birthday. The main event was the unveiling and hanging of his portrait. It was the gift of certain Scottish and Irish friends who insisted on being anonymous, a circumstance which moved a fellow jurist to remark that he could hardly believe that Scots could be so generous or Irishmen so reticent.

* * *

The following extract from the transcript in an accident case appeared recently in *The Shingle* of the **Philadelphia** Bar Association:

"Q. Doctor, in language as nearly popular as the subject will permit, will you please tell the jury just what the cause of this man's death was?

"A. Do you mean the proxima causa mortis?

"Q. I don't know, Doctor. I will have to leave that to you.

"A. Well in plain language, he died of an edema of the brain that followed a cerebral thrombosis or possibly embolism that followed, in turn, an arteriosclerosis combined with the effect of a gangrenous cholecystitis.

"A. JUROR: Well, I'll be damned.

"THE COURT: Ordinarily, I would fine a juror for saying anything like that in court, but I cannot in this instance justly impose a penalty upon you, sir, because the court was thinking exactly the same thing."

* * *

As long as we are not interested, there are two sides to every question. —*South Dakota Bar Journal.*

* * *

The **New York** State Bar Association publishes a weekly Legislative Circular throughout each session of the state legislature and distributes it to its members and to the members of the legislature. The Circular analyzes the purpose, content and legislative position of bills selected for their general importance to the legal profession.

THE COPYING OF ANOTHER'S PRODUCT

(Continued from Page 196)

of plaintiff's chinaware was functional since the design was the principal attraction of the article.

"These criteria require the classification of the designs in question here as functional. Affidavits introduced by Wallace repeat over and over gain that one of the essential selling features of hotel china, if, indeed, not the primary, is the design. The attractiveness and eye-appeal of the design sells the china."

On page 343 the Court further discussed the distinction between functional and non-functional elements as follows:

"Imitation of the physical details and designs of a competitor's product may be actionable, if the particular features imitated are 'non-functional' and have acquired a secondary meaning. *Crescent Tool Co.* v. *Kilborn & Bishop Co.*, 247 F. 299. But, where the features are 'functional' there is normally no right to relief. 'Functional' in this sense might be said to connote other than a trade mark purpose. If the particular feature is an important ingredient in the commercial success of the product, the interest in free competition permits its imitation in the absence of a patent or copyright. On the other hand, where the feature or, more aptly, design, is a mere arbitrary embellishment, form of dress for the goods primarily adopted for purposes of identification and individuality and, hence, unrelated to basic consumer demands in connection with the product, imitation may be forbidden where the requisite showing of secondary meaning is made. Under such circumstances, since effective competition may be undertaken without imitation, the law grants protection."

In the recent case of *Ronson Art Metal Works* v. *Gibson Lighter Mfg. Co.*, 99 U.S. P.Q. 424 (1953), the Court said at page 425,

"This case hence turns upon a single question of fact: Have defendants taken reasonable means to distinguish their lighters from plaintiff's lighters in such way that the public will not be misled into thinking that defendants' lighters are lighters made by plaintiff?"

The Court decided that shape and appearance of an article are not necessarily functional:

"The size, shape, material and appearance of plaintiff's lighters are not the essential features thereof. See *Champion Spark Plug Co.* v. *A. R. Mosler & Co.*, 233 F. 112, 115. Defendants, at little cost and with little inconvenience, could have made, and now can make, their lighters of a different material, of a different color, and with a different shape, and yet have them function equally well and be just as convenient for carrying in the pocket."

Also in point is the statement in *Fox* v. *Glynn,* 73 N. E. 89 (Mass., 1908), at page 92:

" 'The foundation of plaintiff's right' as stated by the Massachusetts court, 'is the fact that the combination of name, size, shape and condition of surface producing a peculiar visual appearance, were all adopted by the plaintiff when not in use by anyone else, and are such a combination as no one else needs to use. . . . . The general right of the defendants to use any size or shape or condition of surface that they choose does not give them a right to adopt a combination of these which will mislead the public, to the plaintiff's detriment and their own advantage'."

A further problem arises where defendant has copied plaintiff's article in its entirety. Frequently an article may contain a number of features, any one of which is open to public use. Yet where the defendant copies all of these features, the result may be deception of the public and equity may enjoin such copying as unfair competition.

In the case of *Geo. E. Fox Co.* v. *Hathaway,* 85 N.E. 417 (Mass., 1905), plaintiff was the first to manufacture loaf of bread of a particular unusual appearance. Plaintiff's bread had a peculiar broken and glazed surface which was neither economical nor necessary. Defendants imitated plaintiff's bread and sold it under a different name. In granting relief to the plaintiff the Court stated at page 418:

" 'The plaintiff had no exclusive right in any one of the features of the combination, and if the defendants had required the use of this combination for the successful prosecution of their business, they would have had a right to use it, by taking such precautions as would prevent deception of the public and interference with the plaintiff's good-will. But the evidence shows that the defendants had no occasion to use this combination, and therefore they were not justified in producing an imitation of the plaintiff's loaves, the natural effect of which would be to deprive it of a part of its trade through deception of the public.' "

In the leading case of *Rushmore* v. *Manhattan,* 163 F. 939 (CCA 2, 1908), defendant copied plaintiff's automobile searchlight, but was careful to place his name prominently on the article as being the maker. The Court nevertheless granted plaintiff injunctive relief, saying at page 942:

" 'We are thus confronted with the naked question of law — Can one who manufactures and sells a well-known article of commerce, like an automobile searchlight inclosed in a shell of

> graceful but unpatented design, maintain a bill for an injunction, profits, and damages against a defendant who sells automobile searchlights inclosed in a similar shell, with his name prominently appearing thereon as the maker, and who has never represented that its lamps were made by the complainant? We feel constrained to answer this question in the affirmative upon the authority of Enterprise Co. v. Landers, and Yale & Town Mfg. Co. v. Alder. Both of these cases were decided by this court and we see no way to distinguish them on principle from the case at bar. We are of the opinion, however, that to answer this question in favor of the complainant carries the doctrine of unfair competition to its utmost limit.' "

The California Supreme Court followed the reasoning of the Rushmore case in *John A. Banzhof* v. *Edward C. Chase,* 150 Cal. 180 (1907). There an injunction was granted on the ground of fraud where defendant so closely copied plaintiff's bread that it enabled him to deceive plaintiff's customer into believing that defendant's bread was that made by the plaintiff. The Court based its judgment on the theory that the acts of the defendant enabled him to appropriate plaintiff's trade.

It thus appears from the cases that it is unfair competition to copy the shape or appearance or any physical elements of another's product, if by so doing the imitator's goods are likely to be confused by the public with those of the first user. This rule is applicable to both functional and nonfunctional features because, as previously stated, even a functional feature or features may not be copied unless proper steps are taken to protect the public from confusion as to source.

In some jurisdictions the Courts require proof of intent to defraud as a prerequisite to the granting of relief to the plaintiff. In other jurisdictions a showing of likelihood of deception is deemed sufficient. California is among the latter group.

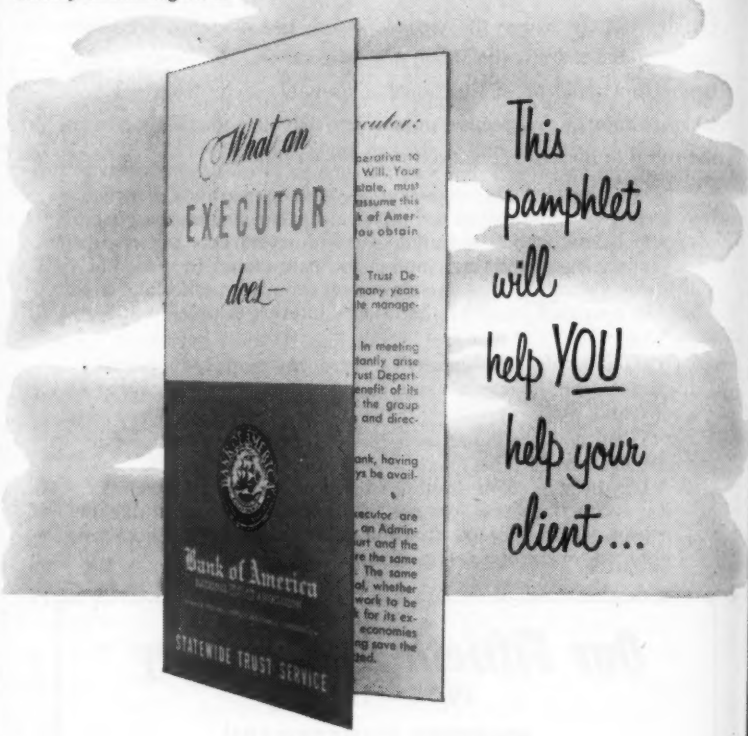
Thus, in *Charles Chaplin* v. *Amador,* 93 Cal. App. 358 (1928), defendant was enjoined from the use of the name "Charlie Aplin" or from marketing motion pictures in imitation of plaintiff and his pictures. The Court indicated that it was the likelihood of deception rather than the intent to deceive that controlled. See also *California Prune Association* v. *H. R. Nicholson Co.,* 69 Cal. App. 2d 207 (1945), *Winfield* v. *Charles,* 77 Cal. App. 2d 64 (1946), and *Weatherford* v. *Eytchson,* 90 Cal. App. 2d 379 (1949).

Section 741 of the Restatement of Torts sets forth a summary of the rule on copying another's article, stating that such is un-

privileged only where the copied feature has acquired secondary meaning and there is likelihood of confusion and the copied feature is non-functional or, if functional, reasonable steps have not been taken to inform prospective purchasers that defendant's goods are not those of plaintiff. The section states as follows:

> "One who markets goods, the physical appearance of which is a copy or imitation of the physical appearance of the goods of which another is the initial distributor, markets them with an unprivileged imitation, under the rule stated in Sec. 711, if his goods are of the same class as those of the other and are sold in a market in which the other's interest is protected, and
> ". . .
> "(b) The copied or imitated feature has acquired generally in the market a special significance identifying the other's goods, and
> "(i) the copy or imitation is likely to cause prospective purchasers to regard his goods as those of the other, and
> "(ii) the copied or imitated feature is non-functional, or, if it is functional, he does not take reasonable steps to inform prospective purchasers that the goods which he markets are not those of the other. (pp. 622-3)."

Choosing the right Executor is as important as consulting an Attorney when making a Will.



Our pamphlet, "What an Executor does," explains in detail the kind of service our bank can make available to your client as *Executor of his Will*. If you would like copies, simply write our Trust Department . . . or ask for them at any Bank of America branch.

Dynamic Trust Management

Bank of America
NATIONAL TRUST AND SAVINGS ASSOCIATION
MEMBER FEDERAL DEPOSIT INSURANCE CORPORATION

CHARITABLE BEQUESTS JUDICIALLY SHELTERED

(Continued from Page 200)

will are voidable, the portion of the estate represented thereby shall pass to a surviving relative only to the extent that such relative [otherwise] takes the same. . .

"In the case at bar, if the gifts to charity . . . were voidable under Section 41 . . . the portion of the estate represented thereby would go . . . under the substitutional clause [to the non-charitable, non-relative takers] . . . There is thus no intestacy as to said portion of the estate. . .

"The conclusion must be that the only relatives of the prescribed classes . . . are precluded by law and by the terms of the will from participating in any distribution of that portion of the estate bequeathed or devised to charity. Therefore, the testamentary dispositions are valid and enforceable. . ."[8]

The Court made no attempt to examine the reason for the 1943 legislative addition to the statute.

Estate of Haines involved similar facts except that the death of the testatrix followed within thirty days after the execution of her will. The Court reversed a ruling of the Sacramento County Superior Court that the gifts to charity were invalid, and said:

"Under the will of Mayme K. Haines, her nephews and nieces are not made beneficiaries under any substitutional or residuary bequest or devise and they cannot inherit under the laws of succession because there is no lack of effective disposition in the will of the portion of the estate represented by the charitable gift."

* * * * *

"The circumstance that the case at bar deals with a charitable gift made within 30 days of death, as conditionally prohibited by the first sentence of Section 41, where as the Davis case dealt with an excessive charitable gift made more than 30 days prior to death, as conditionally prohibited by the second sentence of said section, appears to be immaterial in view of the fact that by the general language of the next succeeding sentences of the section gifts of either kind not expressly prohibited are in effect declared to be valid.

"It is apparent that the 1943 amendment of Section 41 has served to clarify the legislative intent. Not only does it emphasize the rule that a gift to charitable uses is voidable only if the heir would 'otherwise' have taken, as explained in the majority opinion in *Estate of Broad* (1942), 20 Cal. 2d 612 (128 P. 2d 1) (see *Estate of Fleishman*, 62 Cal. App. 2d 588 (145 P. 2d 86); 31 Cal. L. Rev. 118-120; 17 So. Cal. L. Rev. 145-

[8]74 Cal. App. 2d at pp. 361-362.

146), but it also serves to accomplish the result deemed desirable by Mr. Justice Traynor in his dissenting opinion in the Broad case, to wit, that a residuary gift in favor of the heir will defeat intestacy.

"Accordingly, it may be stated that generally speaking a testamentary gift to charity is valid, even though made within 30 days of the testator's death; however, such a gift may nevertheless be avoided at the instance of an aggrieved heir of a designated class, but such heir is not aggrieved unless he would have been entitled to take the property had it not been willed to charity, as in a case where the will provides an alternative disposition to one other than the heir."[9]

The Court made inadequate reference to the cause for the 1943 statutory addition. Its reference to *Estate of Broad* and Judge Traynor's dissent therein will be taken up below.

It seems apparent that both of these decisions have emasculated Section 41 of the Probate Code to the point where it is merely a trap for the unwary lawyer. The section can only operate where a testamentary instrument exists. Most such instruments are drawn by lawyers. A testator on his death bed can leave all of his property to charity, completely foreclosing the rights of his spouse, etc., by his lawyer, or the lawyer for the charity, using the very simple expedient of providing for a gift over to someone other than the testator's spouse, etc., in the event the named charity should fail to take. It would make no difference who was so named in the substitutionary clause, for that person will never have an opportunity to take the property; any name of a living person picked at random from the telephone directory would be sufficient. The probabilities of a corporate charity being unable to take for some reason other than Section 41 are so remote as to merit little consideration; even if this were not so, the lawyer could provide for a charitable gift over based on instructions to the Probate Court to apply the property under the doctrine of *cy-pres*, so that the stranger named in the substitutionary clause would still not take, and the relations denominated in Section 41 as having a superior claim to the testator's bounty would still be completely foreclosed.

This is a result reached because it "is apparent that the 1943 amendment of Section 41 has served to clarify the legislative intent";[10] phrased another way, the legislature intended to obliterate the statute by amending it rather than to go through the process of repealing it. This would indeed be a very strange method of ac-

[9] 76 Cal. App. 2d at 678-679.
[10] 76 Cal. App. 2d at 678.

Retirement Problem

There *may* be a few retirement problems we can't handle — but if your client's retirement problem concerns a PENSION PLAN for his employees, our years of experience can help you set up *exactly* the kind of plan best suited to his needs and to his company's budget.

We act as trustee of all types of pension and profit sharing plans. Our experience can help you solve your problem. Call our Estate Planning Department, MAdison 6-2411.

Southern California's Oldest Trust Company

Title Insurance and Trust Company

433 South Spring Street, Los Angeles 13

complishing a legislative result, and it is not a method to be lightly imputed to such an august body. Let us see whether this imputation is warranted.

STATUTORY HISTORY

Pre-1937 Statute:

The expression of legislative policy now found under Section 41 of the California Probate Code was enacted into the Codes in 1872. That enactment was based on an 1850 California Statute. It has been conducive of litigation. The statute as it existed prior to 1937 read as follows:

> "No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, unless done by will duly executed at least 30 days before the death of the testator. If so made at least 30 days before death, such devises and legacies shall be valid, but they may not collectively exceed one-third of the estate of a testator who leaves legal heirs, and if they do, a *pro rata* deduction from such devises and legacies shall be made so as to reduce the aggregate thereof to one-third of the estate. All dispositions of property made contrary hereto shall be void, and go to the residuary legatees or devisees or heirs, according to law."

Under this statute the justifiable question arose as to whether a charity could take a bequest of all of the estate of a testatrix, where the testatrix died within 30 days after executing her will, and where no "legal heirs" survived the testatrix. The very well reasoned decision of *Esate of Garthwaite,* 131 Cal. App. 321 (1933), held that the charity could not take. It construed the legislative intent, by its failure to mention the existence of heirs in the first sentence of the statute, as requiring such a gift to be completely void rather than voidable.

Post-1937 Statute:

Legislatures, like the mills of God, often grind slowly, yet they, too, grind "exceeding" fine. The California Legislature amended Section 41 in 1937 to its existing form in the first paragraph thereof.[11] In amending a statute, the Legislature is presumed to enact the amendment in the light of and with reference to existing judicial decisions; it is presumed that existing, relevant judicial decisions have had a direct bearing upon the particular amendment.[12] In addition to this presumption, the wording of the 1937 amendment

[11]See Note 4.

[12]*Robertson v. Lanyford* 95 Cal. App. 414, 273 Pac. 150 (1928); *Estate of Garthwaite* 131 Cal. App. 321, 325 (1933); 23 Cal. Jur. 782.

makes it evident that it was designed to change the result reached by *Estate of Garthwaite*. It was effective to accomplish that design, for under it, on facts similar to the *Garthwaite* case, the District Court of Appeal in *Estate of Mautner*, 38 Cal. App. 2d 521, 101 Pac. 520 (1940), held that where no relatives of the class denominated in the statute survived, the charity could take.[13]

Under the 1937 Amendment another interpretative problem arose as to whether the failure of a charitable gift should result in its going to the heirs or to non-charitable takers under the residuary clause. Under the statute as originally enacted, *Estate of Russell*, 150 Cal. 604, 89 Pac. 345 (1907), has decided that a lapsed or void devise goes to the residuary devisee and not to the heir-at-law, absent a contrary intent in the will. A like question was presented to the California Supreme Court under the 1937 Amendment in *Estate of Broad*, 20 Cal. 2 d 612, 128 P. 2d 1 (1942). There, the Court held that the failure of a charitable bequest, under Section 41, should result in the bequest going to the heirs-at-law rather than to the non-charitable residuary legatee on the theory that the 1937 Amendment did not invalidate the bequest or devise to charitable uses but provided that if such bequest or devise were contra to Section 41 that the heirs should take in lieu thereof. Justices Traynor and Edmonds dissented on the theory later picked up by *Estate of Davis* and *Estate of Haines*, that, because a gift over had been provided for, the gifts to charity were valid.

The holding of the majority in *Estate of Broad* was not a necessary one in the light of the language of the 1937 Amendment. It may very well have been dictated in part by an argument evidently made to the Court about the validity of the charitable gifts, witness the dissenting opinion. Whatever the underlying reason was, if any, for the holding of the majority, the fact was established that a testator seeking to specifically bequeath his property to charity and in the alternative providing for its disposition by an otherwise valid residuary clause was to be penalized by having his property pass extra his will by force of statute. The policy of Section 41 was to prevent a charity taking in derogation of the relatives named or indicated therein,[14] and not to prevent some non-charitable taker so taking. The latter proposition may or may not have merit, but it is beyond the pale to suggest that it is within the ambit of Section 41.

[13]See *Estate of Broad* 20 Cal. 2d at pp. 615-618.
[14]See *Estate of Dwyer* 159 Cal. 680, 115 Pac. 242 (1911).

The 1943 Amendment:

In addition to the presumption that legislative enactments reflect relevant prevailing judicial construction, the wording of the 1943 Amendment is particularly responsive to the decision in *Estate of Broad*. Not only was the heading suggestive of the intent ("Section not deemed to vest property in relative") of the Legislature in enacting it, but the very wording itself constitutes a clear, unequivocal response to the problem presented by *Estate of Broad:*

> "Nothing herein . . . shall be deemed . . . to vest . . . property . . . in any . . . relative, unless and then only to the extent that such relative takes the same under . . . the will or under the laws of succession because of the absence of other effective disposition in the will."[15]

This at once seeks to foreclose the thought that the relative should necessarily take as a statutory substitute for the charitable legatee, and to foreclose the taking by such relative where the testator has provided for a gift over to a non-relative in the event of the inability of the charity to take. In effect, *Estate of Broad* is reversed, and as between the beneficiary of the residuary clause and the heir, the former is to take. The language about other effective disposition is used only in the light of *Estate of Broad* to negative the transfer of the property to the heir by force of statute where a legatee other than the charity and the heir is named. The word "effective" could have served as the interpretive key, for construed in the context of *Estate of Broad*, where the bequest to charitable uses was ineffective and where the effect of a gift over was provided by a residuary clause, the Legislature arguably could only have intended the charitable bequest to be *ineffective* and the bequest under the gift over, *effective*. To advocate the existence of some other intent is to argue that the Amendment was enacted in a vacuum, that "effective disposition" means the naming of a legatee who can never take, and that the Legislature intended to destroy the effect of Section 41.

The reference in *Estate of Haines* to the majority opinion in *Estate of Broad* and its explanation that a gift to charitable uses is voidable only if the heir would "otherwise" have taken is probably a reference to the Court's comments on *Estate of Mautner;* as such, it is a misapplication of an irrelevant explanation, for *Estate of Mautner* involved no such facts as faced the Court in *Estate of Haines.*

CRITIQUE

The statutory history seems to indicate that the Legislature has

[15]See Note 4.

been trying for a long time to maintain the effectiveness of Section 41 of the Probate Code, consonant with its ideas of justice and sound policy. There is nothing in that history to indicate an intent to destroy the statute. Indeed, as late as 1942 the majority opinion of the California Supreme Court in *Estate of Broad* referred to "the obvious design [on the part of the Legislature] to protect those heirs against 'hasty and improvident gifts to charity' ".[16]

The province of the Legislature to destroy its creation is invaded and there is a usurption of legislative power where a Court destroys the effect of a statute by a non-necessary interpretation. It is nonetheless a usurption of Legislative power where the destructive result is not seen at the time the interpretation is rendered. The exercise of Legislative power in that case would be inadvertant, but from the viewpoint of the result wrought it is the fact, and not the intent producing the fact, that controls.

On the quite unlikely premise that the destructive effect of the decisions of the District Court of Appeal in *Estate of Davis* and *Estate of Haines* were other than inadvertant, it would constitute a

[16]See *Estate of Broad* 20 Cal. 2d at p. 618.

deliberate "corruption" of the division of governmental powers inherent in the scheme of American Government. What is for the public good, and what are public purposes, are questions which the Legislature must decide upon its own judgment. In exercising that judgment it is vested with large discretion. Where the legislative power has been exercised, the Court can enforce only those limitations which the Constitution imposes; not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism and sense of justice of their representatives.[17] The questions of the wisdom and beneficial operation of statutes are reserved *exclusively* for the Legislature.[18]

On the more likely premise that the destructive effect of the two decisions was inadvertant, some point should be made of the Court's approach to the problems then before it. A cardinal canon of construction requires Courts to consider (1) the former law, (2) situation to be remedied and (3) the law promulgated to remedy the situation.[19] Neither decision paid due heed to number (2) in its interpretation of the 1943 Amendment to Section 41 of the Probate Code. *Neither decision looked to the result that would follow from its holding* in arriving at what it considered to be the legislative intent; nor did either apparently recognize that a literal interpretation does not obtain when the construction would lead to the absurd result of destroying the effect of the statute.[20]

CONCLUSION

Section 41 of the Probate Code represents a public policy ingrained in the laws of California for over one hundred years. If that public policy continues to exist, the section should be amended by the Legislature to foreclose the results of *Estate of Davis* and *Estate of Haines*. If the policy no longer exists, the section should be repealed by the Legislature. The question of the continued effect of a statute is exclusively a legislative question. It is an exclusive function of the Legislature to carry out the answer reached. It is no part of the powers and functions of judges to exercise legislative powers, to fashion idols of their own making and deny, by so doing, the orthodox promulgated by a higher power.

---

[17]E.g., COOLEY'S CONSTITUTIONAL LIMITATIONS, 154: *Daggett v. Colgan* 92 Cal. 53, 28 Pac. 51 (1891); *Stephens v. Chambers* 34 Cal. App. 660, 168 Pac. 595 (1917).

[18]E.g., *Hellman v. Shoulters* 114 Cal. 136, 44 Pac. 915 (1896); *Chenoweth v. Chambers* 33 Cal. App. 104, 164 Pac. 428 (1917).

[19]*Arnold v. Hopkins* 203 Cal. 553, 265 Pac. 223 (1928); *Gregory v. Hecke* 73 Cal. App. 268, 238 Pac. 787 (1925).

[20]See *Stockton School District v. Wright* 134 Cal. 64, 66 Pac. 34 (1901); CCP Sec. 1859.